

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 2000 Session

**CHARLES LIPSCOMB, ET AL. v. ELEANOR YOAKUM,
COMMISSIONER, ET AL.**

**Appeal from the Chancery Court for Davidson County
No. 98-3506-I Irvin H. Kilcrease, Jr., Chancellor**

No. M1999-01665-COA-R3-CV - August 16, 2000

This appeal arises from the trial court's finding that the Commissioner of the Department of Children's Services was in direct violation of Tenn. Code Ann. § 37-5-105(1) when he eliminated the appellees' payment differential after their transfer into the department. We affirm the judgment of the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court
Affirmed**

BEN H. CANTRELL, P.J., M.S., delivered the opinion of the court, in which WILLIAM B. CAIN and PATRICIA J. COTTRELL, JJ., joined.

Paul G. Summers, Attorney General and Reporter; William J. Marett, Jr., Assistant Attorney General, for the appellants, Eleanor Yoakum, as Commissioner of the Department of Personnel and George Hattaway, as Commissioner of the Department of Children's Services.

Larry D. Woods, Nashville, Tennessee, for the appellees, Charles Lipscomb, John Maiuri, Arlene Martin-Norman, Brenda Neal, Nancy Work, Betty Barrett, Susan Hall-Huffman, Patricia Harwood, and Leslie Nims.

OPINION

I.

The appellees were employees of the Department of Human Services ("DHS") who, in July of 1996, were transferred to the newly formed Department of Children's Services ("DCS"). After George Hattaway, the Commissioner of DCS, eliminated the pay differential that the appellees had been receiving, the appellees requested a declaratory order pursuant to Tenn. Code Ann. § 4-5-223 from Eleanor Yoakum, the Commissioner of the Department of Personnel. The appellees alleged that Commissioner Hattaway had violated Tenn. Code Ann. § 37-5-105(1) in eliminating the pay

differential. After a hearing, Commissioner Yoakum's designee found that the discontinuation of the 4.5% pay differential was consistent with the statute. On appeal to the Chancery Court for Davidson County, the Chancellor reversed the agency's order and found that the elimination of the pay differential was in direct violation of the statute. The Chancellor then ordered that the pay differential be reinstated retroactively from the date of its elimination. The appellants now appeal.

II.

While employed by DHS, the appellees worked in the Children's Protective Services (CPS) division. They were also involved in a CPS on-call program. The appellees testified that the program was very demanding, requiring them to wear a pager and to be available twenty-four hours a day. While on call, they were also required to be able to reach any hospital or police department within twenty minutes. The appellees had to be ready to respond to any call at any time. These on-call shifts lasted for one week and the appellees were generally on an every third week rotation schedule. In return for participating in this on-call program, the appellees received a payment differential of 4.5% of their base salary for any period when they were on call.

When DCS was created in May of 1996, the legislature enacted several statutes regarding the creation of the new department of the state and the powers and duties of the department's Commissioner. *See* Tenn. Code Ann. § 37-5-101 et. seq. The statute in question in this case, Tenn. Code Ann. §37-5-105(1), states that the DCS Commissioner has the power and duty to:

- (1) Select and recommend to the appropriate state officials the employment or transfer of all personnel required for the operation of the department, except, however, the transfer of any employees pursuant to this chapter or the initial organization of the new department pursuant to this chapter shall not result in any impairment, interruption or diminution of employee rights, privileges, salary, benefits, leave accumulation or employment.

In light of the above language, this Court must decide whether the pay differential was a right, privilege, salary or benefit for the appellees and, if so, whether the decision to eliminate such differential was a part of the transfer of the appellees and/or the initial organization of DCS.

In his testimony, the Director of Program Operations for DCS, Ken Steverson, admitted that the pay differential was a form of benefits. In addition, Jeff Light, the DHS Personnel Manager, testified that although initially the differential was funded through the DHS general fund, it was later funded in the budget as a specific payroll element for the on-call positions. Susan Huffman, an appellee, testified that when she began to work for DHS she was told that as a CPS on-call employee she would receive a one-step raise. Paul Vandermere, the Budget Director of DCS, testified that for the year of 1996-1997, the year the appellees were receiving the pay differential as DCS employees, the differential amount was included in the "line item salary" of the DCS budget. In light of the foregoing, we find that the appellees were receiving the differential as salary or, at the very least, a benefit associated with participating in the CPS on-call rotation. Therefore, the elimination of the

differential resulted in the “impairment, interruption or diminution” of the appellees’ salaries or benefits.

The elimination of the pay differential occurred after such recommendation was made by a transition team. According to Mr. Steverson, this “departmental transition team” was developed by DCS “to look at . . . pulling the staff from six (6) different departments together into a single collusive unit.” The transition team became aware of the pay differential within the first six months of the transition team meetings. Mr. Steverson testified that “[t]he issue [of the pay differential] with the transition was one of equity for our other staff members.” In a letter to State Senator Michael R. Williams dated August 15, 1997 regarding the elimination of the pay differential, Commissioner Hattaway stated that DCS, as created by the legislature, merged “parts or all of six different departments serving children and families in Tennessee” and part of the DCS mandate “was to create one set of policies and procedures for the department. During this process [DCS] discovered some areas of inequity among our case managers in the field in regard to the on-call policy.”

In light of the foregoing, we find that the decision to eliminate the pay differential was made as part of the initial organization of DCS and the transfer of the appellees. As the Chancery Court pointed out, “[i]t is clear that the legislature intended to ensure that DHS employees who transferred to DCS were unaffected by the transition.” Therefore, we find that Commissioner Hattaway’s decision to eliminate the pay differential was in direct violation of Tenn. Code Ann. § 37-5-105(1).¹

The judgment of the trial court is affirmed and the cause remanded to the Chancery Court for Davidson County for any further proceedings necessary. Tax the costs on appeal to the appellants, Eleanor Yoakum, as Commissioner of the Department of Personnel and George Hattaway, as Commissioner of the Department of Children’s Services.

BEN H. CANTRELL, PRESIDING JUDGE, M.S.

¹ We find it useful to point out that had Commissioner Hattaway’s decision been a part of a reorganization of DCS rather than a part of the initial organization and transfer of employees, such decision would not have been in violation of the statute.